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No. 86-347

In the Supreme Court of the United States

OCTOBER TERM, 1986

DANTE GRASSI AND
DOMINIC SANTARELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of out-of-court declarations under Fed. R. Evid. 803(3) to show an extortion victim's fearful state of mind violates the Confrontation Clause.

2. Whether evidence of petitioners' underworld reputation, admitted solely to show their victims' fear, was unduly prejudicial and should have been excluded under Fed. R. Evid. 403.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 783 F.2d 1572.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a) was entered on March 13, 1986. A petition for rehearing en banc was denied on June 4, 1986 (Pet. App. 16a-17a). On July 3, 1986, Justice Powell extended the time within which to file a petition for a writ of certiorari to and including September 2, 1986, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of extortion, in violation of the Hobbs Act, 18

U.S.C. 1951. Petitioner Santarelli was sentenced to 14 years' imprisonment and fined $10,000. Petitioner Grassi was sentenced to 10 years' imprisonment.

1. The evidence at trial showed that in 1978, Robert Wilson and Richard Williams devised an illegal tax shelter venture using offshore Bahamian corporations. Wilson initially had difficulty finding start-up capital and therefore turned for assistance to petitioner Santarelli, who lived in Wilson's Ft. Lauderdale neighborhood. Santarelli gave Wilson a loan and introduced him and Williams to various influential Bahamians, who in turn helped them establish offshore corporations involved in the tax shelter. Pet. App. 1a-2a.

The tax shelter eventually began to raise a large amount of cash, and by January 1979, Wilson and Williams had repaid Santarelli's loan. Based on their financial success, Wilson and Williams started looking for other investments. In the course of their search, they spoke with one of Santarelli's Bahamian contacts about the possibility of establishing a lottery in the Bahamas. In March 1979, during a visit to the Bahamas, Santarelli learned about the proposed lottery from Charles Tritt, who was associated with Wilson and Williams in the tax shelter venture. Santarelli became upset that Wilson and Williams had not told him about the lottery, and he told Tritt that he was going to "call Florida and tell those two bastards to get over here for a meeting." Pet. App. 2a-3a.

A short time later, petitioner Grassi, who lived near Wilson in Ft. Lauderdale, summoned Wilson and Williams to his apartment. Grassi told them that Santarelli was upset that they did not inform him about the lottery proposal. Williams remarked that the money borrowed from Santarelli had been repaid with interest and that he felt no need to consult with anyone about his future activities. Grassi responded, "You got to show respect," and slapped Williams twice in the face with enough force to

raise welts and bruises. Wilson stepped between the two men, telling Williams to leave matters to him. Later that night, Williams told his girlfriend that he and Wilson had met with Mafia people. Wilson similarly told his wife about the meeting with Mafia people, and then broke down and cried in her presence. Pet. App. 3a, 8a.

Two days later, Wilson and Williams flew to the Bahamas and met with petitioners. Santarelli told them that they should have aproached him about the lottery in light of his help with their tax shelter scheme. He indicated that they "had made him look like a fool with his people in the Bahamas," and that he was "going to take a piece of the Bank"—a reference to the Federal Bank & Trust Company, Ltd., an offshore entity involved in the tax shelter. Williams then asked if Santarelli was taking five percent of the tax shelter scheme. Santarelli jabbed his finger into Williams's chest and said, "No, I'm taking one-third." When Williams started to argue, Wilson intervened and escorted him into the next room. Pet. App. 2a-4a.

When they were alone, Wilson told Williams to "let me handle this." Williams replied that they had done all the work and that "[i]t just [didn't] seem fair." Wilson rejoined: "Well, look, I don't know about you, but I got kids and I don't intend to argue * * *. You don't argue with people like this. If they say they want a third, they're going to take a third and what the hell are you going to do about it." Williams and Wilson thereupon returned to petitioners and told them that they could have a one-third interest in the tax shelter. Pet. App. 4a-5a.

Wilson and Williams subsequently informed Tritt that Santarelli was going to receive one-third of the tax shelter profits, and the three men discussed ways of adjusting the books to lower the profit figures, thereby reducing the share that Santarelli would receive. Wilson voiced opposition to Williams's plan, stating, "Just let it go. We'll pay the money." Pet. App. 5a.

Santarelli subsequently boasted to Tritt about how he had slapped Williams to straighten him out. He told another person that he had slapped Wilson "to get respect from him" and "to remind him who was in charge." Santarelli ultimately collected nearly two million dollars from Williams and Wilson. Pet. App. 5a.

2. Williams and Tritt both testified for the government at trial. Wilson, who was awaiting trial on criminal charges relating to the tax shelter, was not called as a witness. Wilson's out-of-court statements concerning his fear of petitioners were admitted into evidence, over objection, through the testimony of Williams and Tritt.[1]

After the government rested, Wilson appeared in court pursuant to a defense subpoena. The court then conducted a hearing outside the jury's presence to determine whether Wilson was available to testify. Because of his pending criminal case, Wilson invoked his Fifth Amendment privilege and refused to testify. At the government's request, Wilson was immunized, and petitioners were given a one-day recess to interview him. Although petitioners advised the court that Wilson had been "cooperative," they chose not to call him as a witness. Pet. App. 13a-14a.

3. The court of appeals affirmed (Pet. App. 1a-15a). It rejected petitioners' argument that the admission of Wilson's out-of-court statements relating to the extortion victims' fear violated the Confrontation Clause. The court observed (Pet. App. 13a) that petitioners had the opportunity to cross-examine Williams about whether Wilson had made the statements. It also noted (*id.* at 13a-14a) that since Wilson had been produced and immunized, petitioners could have "examine[d] him to their heart's content if they had chosen to do so." The court further held (*id.* at 11a-12a, 15a) that the district court did not abuse its dis-

[1] The trial court instructed the jury that Wilson's statements were admitted solely to show his state of mind (Pet. App. 12a, 21a-23a).

cretion in admitting testimony about Wilson's belief that petitioners were linked to organized crime. That evidence, the court noted (*id.* at 11a-12a), was not offered for its truth, but only to show the victims' state of mind.

ARGUMENT

1. Relying on *Ohio* v. *Roberts*, 448 U.S. 56 (1980), petitioners contend (Pet. 7-19) that their rights under the Confrontation Clause were violated by the admission of Williams's testimony about Wilson's out-of-court statements. While they concede (Pet. 8 n.4) that the statements were properly admitted for the non-hearsay purpose of showing Williams's own state of mind,[2] they argue (Pet. 6-19) that their rights were violated to the extent that those same statements were also used to show Wilson's state of mind. Before admitting the statements for that purpose, petitioners claim, the district court was required to find that the statements were reliable and that Wilson was unavailable. That claim is without merit.

a. In *Roberts,* this Court held that, in order to satisfy the Confrontation Clause, preliminary hearing testimony may not be admitted as a substitute for live testimony absent a showing that the evidence is reliable and that the declarant is unavailable. On the issue of reliability, the Court stated (448 U.S. at 66) that "[r]eliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." It further indicated (*ibid.*) that even where hearsay does not fall within such an exception, it may still be admitted without violating the Confrontation Clause if it is supported by a "showing of particularized guarantees of trustworthiness."

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[2] See *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), slip op. 11 n.11 (noting that admission of non-hearsay does not raise Confrontation Clause concerns).

The Court in *Roberts* also held that before preliminary hearing testimony could be used, the government had to show that the declarant was unavailable. The Court stated, however, that "[a] demonstration of unavailability * * * is not always required" (448 U.S. at 65 n.7). Subsequently, in *United States* v. *Inadi*, No. 84-1580 (Mar. 10, 1986), the Court refused to apply the *Roberts* unavailability rule to co-conspirators' out-of-court statements admitted pursuant to Fed. R. Evid. 801(d)(2)(E). The Court stated (slip op. 4, 6) that *Roberts* was not a "wholesale revision of the law of evidence," but that it "simply reaffirmed a longstanding rule * * * that applies unavailability analysis to prior testimony." Thus, according to the Court, *Roberts* "cannot fairly be read to stand for the radical proposition that no out-of-court statement can be introduced by the government without a showing that the declarant is unavailable" (*id.* at 6). In contrasting the statements before it with those in *Roberts*, the *Inadi* Court pointed out (*id.* at 7) that, unlike co-conspirator declarations made while the conspiracy is in full force, "former testimony often is only a weaker substitute for live testimony" and "seldom has independent evidentiary signficance of its own."

b. In the present case, the reliability requirement was clearly met. Since the declarations at issue fall within a "firmly rooted hearsay exception"—the state of mind exception codified in Fed. R. Evid. 803(3)—reliability can be inferred without more. *Roberts*, 448 U.S. at 66; *Barber* v. *Scully*, 731 F.2d 1073, 1075 (2d Cir. 1984) (applying *Roberts* and concluding that state-of-mind testimony is a firmly rooted exception to the hearsay rule); see generally *McCormick on Evidence* § 294, at 844 (3d ed. 1984) (footnote omitted) ("The special assurance of reliability for statements of present state of mind rests * * * upon their spontaneity and probable sincerity."). Even if an inference of reliability is not permitted by the very nature of the

evidence, it is nonetheless clear that the statements at issue in this case were reliable. As petitioners acknowledge (Pet. 24-25 n.22), an extortion victim's fearful state of mind "can be inferred from the words and acts of the defendant, and in many cases, the very fact that the victim transferred property to the defendant will be strong circumstantial evidence of his fear." In the present case, petitioners' words and actions caused Wilson and Williams to transfer close to two million dollars to Santarelli shortly after Santarelli said he was "taking" one-third of the tax shelter. Under those circumstances, there is little room for doubt that Wilson's fear of petitioners was genuine.

Petitioners contend (Pet. 14-16) that the court of appeals adopted "a conclusive presumption of reliability based on the applicability of a hearsay exception," and that this *per se* approach conflicts with the rule followed in various other circuits. The conflict cited by petitioners is not relevant here; that conflict involves the issue of whether *co-conspirator statements* fall within the category of a "firmly rooted hearsay exception," thereby giving rise to an inference of reliability under *Roberts* (see Pet. 16 & n.13); see generally *Sanson* v. *United States*, 467 U.S. 1264, 1265 (1984) (White, J., dissenting from denial of certiorari) ("The Circuits are divided on the question whether co-conspirator statements fall within the 'firmly rooted hearsay exception' language of *Roberts* or whether, instead, a case-by-case inquiry into reliability is required."). The Court has recently granted review to resolve that conflict. See *Bourjaily* v. *United States*, cert. granted, No. 85-6725 (Oct. 14, 1986). It is unnecessary to hold this case pending the decision in *Bourjaily*, however, because that case does not in any way involve the state-of-mind exception to the hearsay rule. Statements under the state-of mind exception clearly fall within a firmly rooted exception (*Barber*, 731 F.2d at 1075; cf. *Boliek* v. *Missouri*, No. 85-7087 (Oct. 14, 1986) (Marshall, J., dissenting from

denial of certiorari) (asserting that inference of reliability is not appropriate where evidence admitted not to prove state of mind but to show truth of victim's belief that defendant intended to kill her)). Petitioners have cited no case holding that an inference of reliability is improper as to statements offered to establish the declarant's state of mind. Because there is no conflict among the circuits as to the requirement of a separate reliability finding with respect to such statements, further review of that issue is unwarranted.

c. On the issue of unavailability, we submit that statements admitted under the state-of-mind exception to that hearsay rule, like the co-conspirator statements in *Inadi*, are not subject to an unavailability requirement. On this issue, the Federal Rules of Evidence are instructive.[3] Rule 804(b)(1), Fed. R. Evid., the counterpart to the hearsay exception involved in *Roberts*, expressly requires that the declarant be shown to be unavailable. By contrast, there is no unavailability requirement with respect to co-conspirator statements (Fed. R. Evid. 801(d)(2)(E)) or statements admitted to show state of mind (Fed. R. Evid. 803(3)). The reason that the rules do not impose an unavailability requirement with respect to certain categories of hearsay—such as statements admitted under Rule 803(3)—is that "the [declarant's] out-of-court statement is at least as reliable as would be his testimony in person, so that producing him would involve pointless delay and inconvenience." *McCormick on Evidence, supra,* § 253, at 753. A constitutional unavailability requirement for statements offered under Rule 803(3) would impose a substantial additional burden on the prosecution to identify, locate, and produce the declarants, even though the

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[3] While the hearsay rules are, of course, not dispositive on the constitutional issue, they are nonetheless relevant, since the hearsay rule and the Confrontation Clause are designed to protect similar concerns. See, *e.g.*, *Roberts*, 448 U.S. at 66.

out-of-court statements are as reliable as declarants' live testimony. The Court in *Inadi* (slip op. 11) refused to impose those significant burdens on the government in the context of co-conspirator statements, because it recognized that the benefits of such a requirement would be marginal (*id.* at 11-12). Petitioners fail to explain why, in light of *Inadi*, there is any greater reason to impose an unavailability requirement in the context of statements admitted under Rule 803(3).

Even where an unavailability requirement normally applies, it is well established that the Confrontation Clause does not require that unavailability be shown where the testimony is neither crucial to the prosecution nor devastating to the defense. See, *e.g.*, *Ohio* v. *Roberts*, 448 U.S. at 65 n.7; *Dutton* v. *Evans*, 400 U.S. 74, 87 (1970); *United States* v. *Bernard S.*, 795 F.2d 749, 754 (9th Cir. 1986). In the present case, it is undisputed (Pet. 8 n.4) that the testimony at issue was properly admitted for the non-hearsay purpose of showing Williams's fear. Under such circumstances, the additional use of the very same testimony to show Wilson's fear—a showing that was not necessary for the government to meet its burden of proof—clearly was not crucial to the government. Nor was the absence of Wilson's in-court testimony devastating to the defense. See generally *Mutual Life Ins. Co.* v. *Hillmon*, 145 U.S. 285, 295 (1892) (noting that if declarant were to testify, "his own memory of his state of mind at a former time is no more likely to be clear and true than a bystander's recollection of what he then said"). Indeed, petitioners' assumption that they would have benefited from Wilson's testimony is undermined by the fact that their attorneys interviewed him and chose not to call him as a witness at trial.

In any event, even if statements offered to show state of mind could be admitted only if the declarant was produced or shown to be unavailable, that requirement was met

here. Wilson was initially "unavailable" as a prosecution witness because he had a valid Fifth Amendment privilege based on his pending criminal trial relating to the tax shelter. See *Inadi*, slip op. 9. Later in the proceedings, the trial court granted Wilson immunity at the government's request, and Wilson agreed to be interviewed by defense counsel. As the court of appeals observed (Pet. App. 14a), petitioners thus had the chance "to examine Wilson [on the stand] to their heart's content if they had chosen to do so." Nothing more is required by the Confrontation Clause.[4]

2. Petitioners also contend (Pet. 20-25) that Wilson's statements about their reputed underworld connections should have been excluded by the district court under Fed.

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[4] Petitioners argue (Pet. 10-14) that the ability of the defense to call a declarant to the stand, even as a hostile witness, is not equivalent to being able to cross-examine him. And they cite to a conflict in the circuits (Pet. 10-11) on whether the government must actually call a witness to the stand or simply make him available to the defense in order to satisfy the burden of producing the witness at trial. The cases cited by petitioners (Pet. 11 & n.7) in support of their position, however, all predate *Roberts* and *Inadi*. In *Roberts*, the Court rejected the argument that cross-examination is invariably required. In that case, the preliminary hearing testimony introduced at trial by the government was of a witness called at the preliminary hearing *by the defense*. The fact that the prior confrontation was not strictly by way of cross-examination did not render the later use of the testimony improper under the Confrontation Clause (see 448 U.S. at 70-71). Similarly, in *Inadi* the Court strongly suggested (slip op. 9-10 & n.10, 12) that making an out-of-court declarant available to the defense would satisfy the Confrontation Clause even where the Clause would otherwise require the government to show that the declarant was unavailable. See also *Lee* v. *Illinois*, No. 84-6807 (June 3, 1986), slip op. 3 n.3 (Blackmun, J., dissenting) (although majority did not consider issue of unavailability, dissenting justices indicated, citing *Roberts*, that the Confrontation Clause is satisfied where the declarant is present and can be called by either the defense or the prosecution). In any event, since the unavailability requirement does not apply at all in the present case, the conflict cited by petitioners—even if still a live one—is not presented on this record.

R. Evid. 403 on the ground that those references were unduly prejudicial. Petitioners do not dispute that the evidence was relevant to establish the extortion victims' fear (Pet. 24-25),[5] and also that the district court has broad discretion in determining whether to exclude relevant evidence under Rule 403 (see, *e.g.*, *United States* v. *Rodriguez*, 765 F.2d 1546, 1562 (11th Cir. 1985)).[6] They argue (Pet. 24), however, that the admission of the reputation evidence was unfair in this particular case because there was no evidence that petitioners "affirmatively advised or relied upon the reputation" attributed to them.

As the court of appeals reasoned (Pet. App. 8a, 11a-12a), the evidence at trial clearly established that petitioners threatened their victims and sought to instill fear in them. Moreover, petitioners acted in a manner entirely consistent with Wilson's belief that they had underworld connections: they ordered Wilson and Williams to meet with them in South Florida and the Bahamas; they demanded an exorbitant share of the tax shelter proceeds in return for the start-up loan that had been fully repaid; they ordered Wilson and Williams to "show respect"; and they used physical force to obtain both "respect" and money (*id.* at 2a-9a). In short, the evidence in question was highly relevant to show the reason for the victims' fear and to explain why the victims acquiesced in petitioners' demands. Moreover, Wilson's statements were less prejudicial than extrinsic evidence of petitioners' organized

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[5] As noted above, the district court cautioned the jury that the reputation evidence was not admitted to show that petitioners in fact had underworld connections but only to establish the victims' fear (see Pet. App. 12a, 21a-23a).

[6] As the court of appeals correctly observed (Pet. App. 14a), Rule 403 is "an extraordinary remedy" that "should be used sparingly because it permits the trial court to exclude otherwise relevant evidence."

crime connections would have been; it was open to them to argue that Wilson's concerns were unfounded, and that they had not been aware of or tried to exploit his fears of them. Without the evidence of Wilson's statements, however, the jury would not have had a complete picture of the pressures under which Wilson and Williams were acting when they acquiesced in petitioners' demands. Under these circumstances, the probative value of the evidence clearly outweighed its prejudicial impact. The district court therefore did not abuse its discretion in refusing to exclude that evidence under Fed. R. Evid. 403.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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